

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ALLWAYS EAST TRANSPORTATION, INC.

**Cases 03-CA-128669
03-CA-133846**

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445**

**RESPONDENT ALLWAYS EAST TRANSPORTATION, INC.'S REPLY TO
OPPOSITION TO MOTION TO STRIKE GENERAL COUNSEL'S EXCEPTIONS
AND BRIEF AND MOTION FOR TOLLING OF TIME TO FILE AN ANSWERING
BRIEF TO EXCEPTIONS AND BRIEF SUPPORTING EXCEPTIONS**

This is submitted as a reply to the Response by the General Counsel ("GC") to Respondent's motion to strike the Exceptions to the November 12, 2015 Administrative Law Judge's decision, and brief filed by the General Counsel ("GC") supporting said exceptions, in the above named cases, and for tolling of the time to file an answering brief to GC's exceptions and brief supporting said exceptions. As set forth below, GC's arguments must be rejected.

GC's argument to Respondent's request for a tolling of its time to file an answering brief is taken completely out of context and must be rejected. Respondent has moved to strike GC's exceptions, in whole or in part. Accordingly, Respondent requested that its time to file an answering brief to said exceptions be tolled pending the Board's ruling on the instant motion to strike. It simply does not make sense for Respondent to have to file an answering brief to GC's exceptions when the Board may strike said exceptions, in whole or in part. As such, GC's argument that Respondent has received additional time to submit an answering brief to the exceptions is immaterial.

GC's argument that it has satisfied the minimum requirements set forth in Section 102.46(b) of the Board's Rules and Regulations must be rejected. As previously noted, Section 102.46(b) of the Board's Rules and Regulations require that each exception:

(1) (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; **(iii) shall designate by precise citation of page the portions of the record relied on;** and **(iv) shall concisely state the grounds for the exception.** If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in §102.46(j).
(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. **Any exception which fails to comply with the foregoing requirements may be disregarded.**

(emphasis added).

As previously noted, GC has failed to carry out that duty. The exceptions must cite to the portion of the record relied on and state the grounds for the exception. GC states that the brief contains citations to the transcript. Section 102.46(b) of the Board's Rules and Regulations state that "If a supporting brief is filed the exceptions document shall not contain any argument or **citation of authority** in support of the exceptions, but such matters shall be set forth only in the brief." (emphasis added). However, this does not excuse GC from the requirement to cite to the record in the exceptions. Simply put, citing to the record is not the same as a citation of authority, which is not required in the exceptions if contained in the brief. Moreover, the exceptions do not state the grounds for the exception, which is still a requirement even if the brief states the grounds for the exception. As such, the Board should strike each of GC's exceptions for failure to designate by precise citation of page the portions of the record relied on and for failure to concisely state the grounds for the exception. See Board's Rules and Regulations, Section 102.46(b)(1)(iii), (iv).

GC's argument that it "has not withdrawn from any stipulations" regarding exception no. 5 must be rejected. In fact, GC previously stipulated "that the operative date for determining if successorship has been established is April 22, 2014." However, in exception no. 5, GC states that "[t]he ALJ's failure to provide for and consider the legal significance of the **timeframe** for the finding that Respondent "shuttled 8 to 10 drivers and monitors between Yonkers and Wappingers Falls on a daily basis. (ALJD 3:35-36)." GC cannot now argue that the ALJ failed to consider the timeframe of when respondent

shuttled drivers between Yonkers and Wappingers Falls since the parties clearly stipulated that the “timeframe” to be analyzed in this case is April 22, 2014. Thus, exception 5 is in clear contradiction to the stipulation agreed upon at the hearing and must be stricken.

Finally, GC is correct that it had requested for a document previously marked for identification as GC-15 to be placed in the rejected exhibit folder (13 weeks after the ALJ “rejected” the exhibit). However, GC has cited no authority that allows a rejected exhibit to be utilized in exceptions to an ALJ determination and in their supporting brief, as if the document was admitted into evidence. As a matter of fact, GC quotes rejected exhibit GC-15 in his brief prior the Board ruling on whether it should be placed in the record of this case. Such an act prejudices Respondent as it had no opportunity to oppose the placement of the exhibit in the record before the Board had the ability to review the rejected exhibit quoted in GC’s brief. Simply stated, GC put the cart before the horse.

Based on the above, the Board should grant Respondent’s motion to strike GC’s exceptions and brief supporting said exceptions in its entirety or in the alternative, that certain exceptions be struck. Moreover, the Board should toll Respondent’s time to file answering briefs to 30 days from the date that the decision on the instant motion is issued and sent to counsel, or February 12, 2016, whichever is later.

DATED at Lake Success, New York, this 8th day of January, 2016.

Respectfully submitted,

/s/

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STATEMENT OF SERVICE

I hereby certify that on January 8, 2016, I electronically filed Allways East Transportation, Inc.'s Reply to Opposition to Motion to Strike General Counsel's Exceptions and Brief supporting Exceptions, and Motion for an Extension of Time to file an answering brief to General Counsel's exceptions and brief supporting said exceptions, using the NLRB E-Filing System, and I hereby certify that I provided copies of the same document via email to John Grunert, Counsel for The General Counsel of the National Labor Relations Board, and Daniel E. Clifton, Counsel for International Brotherhood of Teamsters, Local 445.

DATED at Lake Success, New York, this 8th day of January, 2016.

Respectfully submitted,

/s/

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